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CHELSEA CABALONA ABDULLAH

v.

SIEK MING HUA

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HIGH COURT MALAYA, KUALA LUMPUR

AZIAH ALI JC

[ORIGINATING SUMMONS NO: S8-24-1993-2004]

15 JANUARY 2007

- C ***FAMILY LAW: Children - Illegitimate - Application for custody and maintenance - Guardianship of Infants Act 1961 - Whether applicable - Factors considered - Whether there were compelling reasons to deny plaintiff guardianship, custody, care and control of the children - Courts of Judicature Act 1964, s. 24(d) - Whether maintenance claim should be***
- D ***under Married Women and Children (Maintenance) Act 1950***

E The plaintiff and the defendant lived together from 1997 till 2000 and have two children born out of wedlock, a girl aged eight years and a boy aged seven years. According to the plaintiff in July 2000, the defendant left her and the children and returned to Kuala Lumpur. In July or August 2001, the plaintiff came to Kuala Lumpur to look for a job. She managed to secure employment and the children came to stay with her in Kuala Lumpur. In December 2003, the defendant requested to take the son to Ipoh and the plaintiff agreed. However, the defendant failed to return the son to her. On 5 January 2004, the son was returned to the mother. On 31 January 2004, the plaintiff said the defendant contacted her to say that he had prepared a custody agreement and that he was willing to pay RM800 per month as the children's maintenance. The defendant requested to meet her at a fast food outlet. According to the plaintiff, when she turned up with the children and her relatives, there was no agreement. Instead, the defendant took away the son without her consent. The plaintiff then lodged a police report and filed for (1) custody of the children; (2) for the defendant to return the son to the plaintiff; (3) that the defendant should not be allowed to take the children without the plaintiff's consent; (4) defendant be allowed access under supervision and (5) defendant to pay a maintenance fee of RM800 monthly to the children. After considering the affidavits and hearing submissions made, the court granted an order in terms of prayers 1, 2 and 3. In respect of prayer 4 with regard to access, the prayer was allowed with an amendment where the plaintiff agreed to withdraw the words 'dengan

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pengawasan.’ In respect of prayer 5, an order was made that the application for maintenance be filed under the Married, Women And Children (Maintenance) Act 1950 (Act 263). The defendant now appealed against this decision.

Held:

(1) The Guardianship of Infants Act 1961 does not apply to illegitimate children and the plaintiff could not bring an action for guardianship, custody, care and control of the two children under the 1961 Act. However, the court could make orders relating to guardianship, custody, care and control of illegitimate children under s. 24(d) of the Courts of Judicature Act 1964. (para 10)

(2) Unlike the defendant who left the plaintiff and the children in East Malaysia when he returned to West Malaysia, the plaintiff had at no time abandoned the children to the care of some other party save for the time when she left them in the care of the defendant’s mother while she came to Kuala Lumpur to look for a job. Having found a job, she took the children to stay with her. On the part of the defendant, it was not denied that the son was actually cared for by his wife in Ipoh since he worked in Shah Alam during the week. Due to his work commitments, the defendant was able to spend time with the son during the weekends only. On the other hand should custody, care and control of the son be with the plaintiff, the son will stay with her and while she is at work her mother would be available to care for the children until she returned. (para 12)

(3) There was no evidence to suggest that removing the son from his present environment was detrimental to his welfare. It was better for the son to be brought up by his natural mother than by the defendant’s wife. He deserved the love and care that only the plaintiff could give. There was no evidence that the plaintiff was an unfit mother. Thus, there was no compelling reason to deny the plaintiff the guardianship, custody, care and control of the two children. By virtue of s. 24(d) of the 1964 Act, the plaintiff’s prayer for guardianship, custody, care and control of the two children was allowed. Consequently, prayers 2, 3 and 4 were also allowed in terms. The defendant was given reasonable unsupervised access as agreed to by the plaintiff. In respect

- A of prayer 5, the plaintiff was ordered to file her claim for maintenance under the Married Women and Children (Maintenance) Act 1950. Therefore, the plaintiff was ordered to file her claim against the defendant for maintenance for the two children in the subordinate court, which is the court of
- B first instance under the 1950 Act. (para 12, 13 & 14)

[Order accordingly.]

Case(s) referred to:

- C *Chang Ah May v. Francis Teh Thian Sar* [1991] 1 CLJ 309; [1991] 2 CLJ (Rep) 412 HC (*refd*)
Khor Liang Keow v. Tee Ming Kook [1996] 2 CLJ 631 HC (*refd*)
Koh Lai Kio v. Low Nam Hui [2005] 3 CLJ 139 HC (*refd*)
Low Pak Hiong v. Tan Kok Keong [1998] 1 CLJ Supp 357 HC (*refd*)
Re Balasingam & Paravathy [1970] 1 LNS 134 (*refd*)
- D *Sinnakaruppi Periakaruppan v. Bathumalai Krishnan* [2001] 2 CLJ 435 HC (*refd*)
Tang Kong Meng v. Zainon Md Zain & Anor [1995] 4 CLJ 409 HC (*refd*)
W v. W [1968] 3 All ER 408 (*refd*)

Legislation referred to:

- E Courts Of Judicature Act 1964, s. 24(d)
Guardianship of Infants Act 1961, s. 19A(2)(a)
Law Reform (Marriage and Divorce) Act 1976, s. 87
Married Women And Children (Maintenance) Act 1950, s. 3
- F *For the plaintiff - Pushpa Ratnam; M/s Pushpa Ratnam*
For the defendant - Jagathisvaran Ramachandran; M/s The Chambers of Jag Ramachandran

Reported by Suhainah Wahiduddin

G **JUDGMENT**

Aziah Ali JC:

- H [1] The plaintiff and the defendant lived together from 1997 till 2000, initially in Kota Kinabalu and then in Labuan. They have two children born out of wedlock, a girl named Siek Li Yee Shereen and a boy named Siek Thai Hau Chris, aged eight years and seven years respectively (exh. "CC1" of encl. 2).
- I [2] For the purpose of this appeal only the facts relevant to the appeal are referred to. According to the plaintiff in July 2000 the defendant left her and the children and returned to Kuala Lumpur. In October 2000 the plaintiff converted to Islam but the children did not. The plaintiff had no contact with the defendant until she

came to Kuala Lumpur in March or April 2001. She went to stay with the defendant's mother in Ipoh for four months. In July or August 2001 the plaintiff came to Kuala Lumpur to look for a job and stayed with her sister. The children were looked after by the defendant's mother. She managed to secure employment and the children came to stay with her in Kuala Lumpur. In December 2003 the defendant requested to take the son to Ipoh and the plaintiff agreed. However the defendant failed to return the son to her. On 5 January 2004 the son was returned to her. On 31 January 2004 the plaintiff says the defendant contacted her to say that he has prepared a custody agreement and that he was willing to pay RM800 per month as the children's maintenance. The defendant requested to meet her at a fast food outlet in Klang. According to her when she turned up with the children and her relatives, there was no agreement. Instead the defendant took away the son without her consent. The plaintiff then lodged a police report (exh. "CC4" encl. 2). On 14 September 2004 the plaintiff filed an application as follows:

1. Plaintiff diberi hak penjagaan, pemeliharaan dan kawalan (guardianship, custody, care and control) terhadap kanak-kanak SIEK LI YEE SHEREEN (tarikh lahir 30.3.1998) dan SIEK THAI HAU CHRIS (tarikh lahir 20.3.1999);
2. bahawa Defendan memulangkan kepada Plaintiff anaknya SIEK THAI HAU CHRIS;
3. bahawa Defendan dihalang dari mengalih kanak-kanak SIEK LI YEE SHEREEN dan SIEK THAI HAU CHRIS dari pemeliharaan dan penjagaan Plaintiff tanpa kebenaran Plaintiff;
4. Defendan diberikan akses yang munasabah dengan pengawasan;
5. Defendan membayar nafkah sebanyak RM800.00 setiap bulan kepada anak-anaknya SIEK LI YEE SHEREEN dan SIEK THAI HAU CHRIS;
6. Kos dalam kausa; dan
7. Perintah lain atau relif selanjutnya yang difikirkan sesuai dan adil oleh Mahkamah Yang Mulia ini diberi atau dibuat.

After considering the affidavits and hearing submissions made, I granted an order in terms of prayers 1, 2 and 3 of encl. 1. In respect of prayer 4 with regard to access, the prayer was allowed with an amendment where the plaintiff's counsel agreed to

A withdraw the words ‘dengan pengawasan’. In respect of prayer 5, I made an order that the application for maintenance be filed under the Married Women And Children (Maintenance) Act 1950 (Act 263). Each party was ordered to bear their own cost. The defendant now appeals against this decision.

B [3] The defendant admits that he and the plaintiff lived together from 1997 till 2000 and that they have two children as deposed by the plaintiff in paras 3 and 4 of her affidavit encl. 2. He says that the plaintiff was willing to cohabit with him despite knowing that he is already married with two children. He denies that there was an agreement and that he was willing to pay maintenance as alleged by the plaintiff. He says that he gives financial contributions to the plaintiff for the children based on his capacity. The defendant denies that the son refused to follow him. He says that the son was willing to follow him because the son knows who his father is.

E [4] The defendant’s wife and children live in Ipoh. The defendant works in Shah Alam and returns to Ipoh during the weekends. The son Siek Thai Hau Chris lives in Ipoh with the defendant’s wife, his mother and his two daughters. He is being cared for by the defendant’s wife.

Issue Of Guardianship, Custody, Care And Control

F [5] The plaintiff’s application for guardianship, custody, care and control of her two children is based on the Guardianship of Infants Act 1961 (the 1961 Act). The plaintiff’s counsel submits that the application is made under the 1961 Act as the Law Reform (Marriage and Divorce) Act 1976 (the 1976 Act) does not apply to illegitimate children (see s. 87 of the 1976 Act). Counsel submits that s. 19A(2)(a) and (b) of the 1961 Act allows the court to grant both custody and maintenance for the son. Counsel referred to the cases of *Koh Lai Kiow v. Low Nam Hui* [2005] 3 CLJ 139; [2005] 7 MLJ 143 and *Sinnakaruppi a/l Periakaruppan v. Bathumalai a/l Krishnan* [2001] 2 CLJ 435; [2000] 6 MLJ 29 and urges the court not to follow the case of *Koh Lai Kiow v. Low Nam Hui*. Alternatively counsel relies on s. 24 of the Courts of Judicature Act 1964 (the 1964 Act).

I [6] For the defendant, counsel submits that the 1961 Act does not apply to illegitimate children. Counsel urges the court to apply the same considerations applicable under the 1976 Act in deciding

on the issue of custody, care and control. According to counsel, the son has been living with the defendant's family for the last two years. He speaks Chinese and goes to a Chinese school. He submits that the defendant is not an irresponsible father. Counsel urges the court to consider the welfare of the child and the wishes of the parent and refers to the case of *W v. W* [1968] 3 All ER 408 to show that a boy of the age as the plaintiff's son should be with the father.

[7] With regard to the issue whether the plaintiff can rely on the Guardianship of Infants Act 1961 (the 1961 Act) to support her application for guardianship, custody, care and control of her two children, I refer to the judgment of the learned Azahar Mohamed JC (as he then was) in the case of *Koh Lai Kiow v. Low Nam Hui* (*supra*) wherein His Lordship referred to the cases of *Re Balasingam & Paravathy* [1970] 1 LNS 134; [1970] 2 MLJ 74, *Khor Liang Keow v. Tee Ming Kook* [1996] 2 CLJ 631 and *Sinnakaruppi a/l Periakaruppan v. Bathumalai a/l Krishnan* (*supra*) as follows:

It seems that the first reported local case on the question whether the 1961 Act applies to illegitimate children was *Re Balasingam & Paravathy* [1970] 1 LNS 134; [1970] 2 MLJ 74. The following passages in the judgment of Raja Azlan Shah J (as His Majesty then was) at p. 75 of the report is of relevance:

The Guardianship of Infants Act 1961 does not seem to provide for illegitimate children. The remarkable absence of any reference to illegitimate children other than in the abovementioned section 1(2)(a) would seem to favour the proposition that Parliament intended the Act not to apply to illegitimate children. This proposition is fortified by respondent's arguments on the correct construction of the words "father" and "mother" in section 5 and 6. Furthermore, adopting the approach taken by Viscount Simonds in *Galloway v. Galloway* it is safer to say that "infant" means legitimate infant unless there is some repugnancy or inconsistency and not merely some violation of the moral obligation or of a probable intention resulting from so interpreting the word. Accordingly, since none of the words "father", "mother" or "infant" can be construed to mean illegitimate infant or the *de facto* parents of illegitimate children, it must be concluded that the Act does not apply to illegitimate children.

His Lordship then referred to the case of *Khor Liang Keow v. Tee Ming Kook* (*supra*) wherein Zulkefli Ahmad Makinudin JC (as he then was) followed the case of *Re Balasingham & Paravathy*. In his judgment Azahar Mohamed J said as follows:

- A At p. 638 of the report Zulkefli Ahmad Makinuddin JC (as he then was) said:
- B Saya berpendapat dalam kes ini timbul persoalan samada Mahkamah mempunyai bidangkuasa atau tidak di bawah Akta Penjagaan Kanak-Kanak 1961 untuk mendengar permohonan untuk perintah hak penjagaan dan pengawalan ke atas kedua-dua anak yang tak sah taraf ini. Dalam hal ini peguam plaintif telah merujuk kepada saya kes *Low Pek Nai v. Koh Chye Guan @ Koh Chai Guan* [1995] 2 CLJ 110 di mana Yang Arif Hakim Mohd. Hishamudin telah memutuskan bahawa Akta Penjagaan Kanak-Kanak 1961 terpakai kepada anak tak sah taraf dan Mahkamah mempunyai bidangkuasa untuk mendengar permohonan ibu sebenar untuk hak penjagaan dan pengawalan ke atas anak tak sah taraf tersebut. Yang Arif Hakim Mohd. Hishamudin dalam penghakimannya telah merujuk kepada peruntukan s. 3 Akta tersebut yang menyatakan bahawa peruntukan tersebut membolehkan Dewan Undangan Negeri meluluskan pemakaian Akta tersebut kepada kanak-kanak Muslim tidak kira samada anak itu sah taraf atau tidak sekiranya ianya tidak bertentangan dengan Undang-Undang Islam. Yang Arif Hakim tersebut menyatakan jika peruntukan ini membolehkan pemakaian terhadap kanak-kanak Muslim maka Akta tersebut juga adalah terpakai kepada semua kanak-kanak secara am samada ianya sah taraf atau tidak. Dengan rasa penuh hormat kepada pandangan Yang Arif Hakim Mohd. Hishamudin ini dalam isu bidangkuasa Akta tersebut bagi mendengar permohonan penjagaan anak tak sah taraf, saya lebih cenderung berpegang kepada pandangan yang telah diberi oleh Yang Arif Hakim Raja Azlan Shah (DYMM Paduka Seri pada masa itu) dalam kes *Re Balasingam (supra)* dimana telah diputuskan bahawa Akta Penjagaan Kanak-Kanak 1961 tidak terpakai kepada anak tak sah taraf.
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- G [I am of the opinion that the question that arises in this case is whether or not the court has the jurisdiction under the Guardianship of Infants Act 1961 to hear an application for an order of guardianship and custody of the two illegitimate children. In this case the plaintiff's counsel has referred me to the case of *Low Pek Nai v. Koh Chye Guan @ Koh Chai Guan* [1995] 2 CLJ
- H 110 where the Honourable Justice Mohd. Hishamudin had held that the Guardianship of Infants Act 1961 applies to illegitimate children and the court has the jurisdiction to hear an application by the natural mother for guardianship and custody of the illegitimate child. The Honourable Justice Mohd Hishamudin in his judgment had referred to the provision of s. 3 of the said Act
- I which enables the State Legislature to approve the application of the said Act to Muslim children, whether they are legitimate or not, as long as it does not violate the laws of Islam. The learned

Judge has stated that if this provision applies to Muslim children, the Act will be applicable to all children generally whether legitimate or not. With due respect to the view of the Honourable Justice Mohd Hishamudin in respect of the issue of jurisdiction under the Act to hear an application for guardianship of an illegitimate child, I am more inclined to hold the view given by the Honourable Justice Raja Azlan Shah (as His Majesty then was) in the case of *Re Balasingam (supra)* where it was held that the Guardianship of Infants Act 1961 is not applicable to illegitimate children.] (English translation provided.)

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And, later still he said this:

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Saya berpendapat adalah jelas Parlimen tidak berhasrat Akta Penjagaan Kanak-Kanak 1961 tersebut terpakai kepada anak tak sah taraf dengan tiada rujukan secara langsung terhadapnya dalam Akta tersebut.

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["I am of the view that it is clear that Parliament does not intend the Guardianship of Infants Act 1961 to be applicable to illegitimate children, without any direct reference to them in the Act."] (English translation provided by Editor).

[8] Azahar Mohamed J then went on to discuss the case of *Sinnakaruppi a/l Periakaruppan v. Bathumalai a/l Krishnan (supra)* and the judgment of Jeffrey Tan J, therein who said *inter alia* as follows:

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Evidently, there is no unanimity of views. Only one case said that the GIA is applicable to illegitimate children. And only one case said that the mother seeking custody of her illegitimate children should do so by way of wardship proceedings. Still, the preponderant view is that the court has jurisdiction under s. 24 of the CJA to grant custody and guardianship of both legitimate or illegitimate infants, regardless of the GIA. It does not appear therefore, that the present plaintiff must proceed by way of wardship proceedings. Indeed, in the light of the latest amendments of the GIA (see Guardianship of Infants (Amendment) Act 1999 effective 1 October 1999), and the substitution of the former s. 5 by an altogether new s. 5 providing for equality of parental rights, there is less reason to doubt that the GIA in present form does not apply to illegitimate children ... In any event, s. 24 of the CJA confers jurisdiction on the court to appoint and control guardians of infants and generally over the person and property of infants, a jurisdiction that is not only restricted to cases within the GIA.

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A [9] The statement regarding s. 24 of the Courts of Judicature Act 1964 (the 1964 Act) in the above case is an affirmation of the decision in the case of *Low Pak Houng v. Tan Kok Keong* [1998] 1 CLJ Supp 357 wherein Abdul Aziz Mohamad J (as he then was) said *inter alia*:

B The wider question whether the Act as a whole applies only to legitimate children and does not apply to illegitimate children is of concern to me in this application only because of the position of the mother. That is because if the entire Act does not apply to illegitimate children – as was decided in *Re Balasingam* – then s. 6 is concerned only with legitimate children and the position of the mother in this case is not provided for in s. 6 and, further, if *Re Balasingam* were to be followed by analogy, the court would have no jurisdiction to entertain her application as an application under the 1961 Act which, on its face, it is. I do not, however, need to come to a determination of my own whether – as decided in *Re Balasingam* – the 1961 Act does not apply to illegitimate children, although it does appear to me, after studying *Re Balasingam* and the English case of *In Re C. T. (an infant)* [1957] Ch 48, which greatly influenced *Re Balasingam*, that it would be no easy matter to maintain that s. 6 or any other section of the 1961 Act does apply to illegitimate children. If s. 6 does not apply to illegitimate children, so that the mother in this case cannot rely on it to claim guardianship of the child, then the question must be decided according to the common law of England, under which the mother, to the exclusion of the father, has rights over and obligations towards her illegitimate child. For that reason, I would order that the mother be the guardian of the child.

F That the mother of an illegitimate child has rights over the child to the exclusion of the father is reflected in s. 11 of the Legitimacy Act 1961 – originally enacted as Act No. 11 of 1961 and now revised as Act 60 – which section contains provision for an illegitimate child to take an interest in the property of his mother on her death intestate, but does not make a corresponding provision in respect of the father, and provision for the mother to take an interest in the property of the child on his death intestate, but no provision for the father. Section 11 provides as follows:

H 11.(1) Where, on or after the prescribed date, the mother of an illegitimate child, the child not being a legitimated person, dies intestate as respects all or any of her property, and does not leave any legitimate issue surviving her, the illegitimate child, or if he is dead his issue, shall be entitled to take any interest therein to which he or his issue would have been entitled if he had been born legitimate.

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(2) Where, on or after the prescribed date, an illegitimate child, not being a legitimated person, dies intestate as respects all or any of his property, his mother, if surviving, shall be entitled to take any interest therein to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent.

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In *Re Balasingam* it was decided that the High Court has no jurisdiction to entertain custody proceedings which cannot be brought under the 1961 Act. The decision would apply equally to guardianship proceedings. It would follow from that decision that if the mother's application in this case cannot be brought under the Act, the High Court has no jurisdiction to entertain it. I would respectfully differ with that decision. Section 24(6) of the Courts of Judicature Act 1964 gives the High Court "jurisdiction to appoint and control guardians of infants and generally over the person and property of infants". It does not seem to me right that the jurisdiction should be restricted to cases that can fall within the 1961 Act.

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[10] Having regard to all the above authorities and following the judgments therein I therefore find that the 1961 Act does not apply to illegitimate children and the plaintiff cannot bring an action for guardianship, custody, care and control of the two children under the 1961 Act. However, as decided in the above authorities, the court can make orders relating to guardianship, custody, care and control of illegitimate children under s. 24(d) of the Courts of Judicature Act 1964 (1964 Act).

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[11] Whilst the court has power to make an order under s. 24(d) of the 1964 Act, the welfare of the children is of paramount importance in deciding on issues of custody, care and control. The case of *Tang Kong Meng v. Zainon bt Md Zain & Anor* [1995] 4 CLJ 409 also involves the issue of custody of an illegitimate child. James Foong J (as he then was) said *inter alia* "In considering the question, of custody, the welfare of the child is of paramount importance." The parties had agreed that I interview the two children for the purpose of allowing the children to express themselves and to enable the court to consider what is best for their welfare. As the children are eight and seven years old respectively, I am mindful of what the court had said in the case of *Chang Ah May v. Francis Teh Thian Sar* [1991] 1 CLJ 309; [1991] 2 CLJ (Rep) 412:

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- A Now it has been judicially accepted that if a child is old enough to express its own wishes, the Court will consider them, not so that it can give effect to those wishes but to be the better to Judge what is best for the child's welfare. It must also be remembered that if the child's own wishes are so contrary to its
- B long-term interests, the Court may feel justified in disregarding them altogether. In the present case the infant is only 10 years old. I do not think she is old enough to realise what is best for her own welfare much less for her long-term interests, in any case the infant has not said that she dislikes let alone hates her mother.
- C The issue of custody, care and control in the abovementioned case was decided under the 1976 Act. However I see no reason not to adopt the views expressed by the learned judge therein. On this matter I am also obliged to take into account the position of the plaintiff and the defendant under the law as stated by Shankar
- D J in *T v. O* which was referred to in *Koh Lai Kiow v. Low Nam Hui* (*supra*), that is:

Under English common law, a father of an illegitimate child had no rights over the child merely by virtue of his paternity.

- E I also refer to the case of *Tang Kong Meng v. Zainon bt Md Zain & Anor* (*supra*). On the facts in that case James Foong J (as he then was) said *inter alia*:

- F There is never a dispute in this case that Alvina is an illegitimate child of Madam Chong and Tang. Being an illegitimate child, even Encik Karpal Singh has candidly admitted that the putative father has no legal right over the child under civil law, and the natural mother has the obligation not only to maintain the child, but is also entitled to exclusive care. (See the case of *R v. Brighton (Inhabitants)* [1861] 1 B&S 447; *Homer v. Homer* [1979] 1 Hag. Con, 337 which were accepted in our Malaysian Courts in *T v. O* [1992] 1 LNS 45; [1993] 1 MLJ 168 and *Tam Ley Chian v. Seah Heng Lye* [1993] 1 LNS 72). This must be the state of law for under s. 27 of the Civil Law Act, provides that:
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- H All cases relating to custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England at the date of the coming into force of this Act (the Civil Law Act), regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law.

- I [12] In the present case the defendant's counsel raised the issue that the son speaks Chinese, attends a Chinese school and is used to Chinese customs. However I am of the view that this does not

merit too much emphasis as the son is still young and will most probably adapt again to the lifestyle that he was used to when he was brought up by the plaintiff before he was taken away by the defendant, I am mindful of the fact that the plaintiff has converted to Islam. But her counsel urged the court to consider the fact that she had not converted her daughter who has been in her custody, care and control all the while. I also considered the fact that unlike the defendant who left the plaintiff and the children in East Malaysia when he returned to West Malaysia, the plaintiff had at no time abandoned the children to the care of some other party save for the time when she left them in the care of the defendant's mother while she came to Kuala Lumpur to look for a job. Having found a job, she took the children to stay with her. On the part of the defendant it has not been denied that the son is actually cared for by his wife in Ipoh since he works in Shah Alam during the week. Due to his work commitments the defendant is able to spend time with the son during the weekends only. On the other hand should custody, care and control of the son be with the plaintiff, the son will stay with her and while she is at work her mother is available to care for the children until she returns. The plaintiff's sister also stays with her. The information that the plaintiff's mother and sister are staying with her was given to me by the daughter during the interview. I also did not find any evidence to show that the son is unhappy staying with the plaintiff, his elder sister and his grandmother and aunt. There is no evidence that he dislikes them. Neither is there evidence that he does not get along with his elder sister. On the contrary I noted during the interview that both of them get along fine. Therefore I found no evidence to suggest that removing the son from his present environment is detrimental to his welfare. In my opinion it is better for the son to be brought up by his natural mother than by the defendant's wife. He deserves the love and care that only the plaintiff can give. There is no evidence that the plaintiff is an unfit mother. Thus I did not find any compelling reason to deny the plaintiff the guardianship, custody, care and control of her two children. By virtue of s. 24(d) of the 1964 Act I allowed the plaintiff's prayer for guardianship, custody, care and control of the two children. Consequently prayers 2, 3 and 4 were also allowed in terms. The defendant is given reasonable unsupervised access as agreed to by the plaintiff.

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A Issue Of Maintenance

B [13] On the issue of the plaintiff's financial capacity to maintain the child, counsel for the defendant submits that there is no evidence that the plaintiff earns an income and is able to provide for the son compared to the defendant. Counsel refers to s. 3 of the Married Women and Children (Maintenance) Act 1950 (the 1950 Act) and the case of *Koh Lai Kiow v. Low Nam Hui* and submits that this court is not the proper forum for the plaintiff to apply for maintenance. On this issue I refer again to the case of *Koh Lai Kiow v. Low Nam Hui* (*supra*) wherein the learned Judicial Commissioner said:

D It will be noted that in the case at hand, as I have emphasized earlier, the subject matter is the maintenance for illegitimate children. This brings me again to s. 3(2) of the 1950 Act. To my mind, this section is the relevant provisions to the matter in issue before me. I think it is important to keep in mind that the section is a special provision dealing with the maintenance for illegitimate children. The point is this. This section is very clear and direct. It is specifically designed to provide maintenance for illegitimate children. I say this because in the face of the abundantly clear words, the express stipulations of s. 3(2) in the light of its specific intention and object cannot be disregarded. I lay emphasis on the fact that the 1950 Act is an earlier statute where the legislature has specifically directed its attention and made provisions for maintenance of illegitimate children. I need hardly to say that the court must give effect to the clear and explicit language in legislations enacted by Parliament. Section 3(2) of the 1950 Act was referred to by Shankar J (as he then was) in *T v. O* [1992] 1 LNS 45; [1993] 1 MLJ 168. In the course of his judgment in that case, Shankar J said this at p. 172:

G Under English common law, a father of an illegitimate child had no rights over the child merely by virtue of his paternity. He had a legal obligation to support it, provided that it could be legally established that he was the father. That had to be done by extrinsic evidence. Maternity is a fact. Paternity only an opinion.

H The very serious social consequences which would follow by equating a natural father or mother to a lawful father or mother in the English legislation under consideration has been spelt out at great length and with great clarity by Roxburgh J and need not be repeated here.

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Under our Married Women and Children (Maintenance) Act 1950 s. 3(2), due proof is required both that the person sued is the father, and that his illegitimate child is unable to maintain itself, before the court will order maintenance. But once again, be it noted that the sum is not to exceed RM50 per month! Legitimate children can get a reasonable monthly allowance, as can their mothers. Mothers of illegitimate children are not provided for.

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I would respectfully agree with the views expressed by the learned judge. Nonetheless, I need to say something about the limit of RM50 mentioned by Shankar J. With respect, the limit of RM50 was removed by the Schedule to the Law Reform (Marriage and Divorce) Act 1976, which came into force on 1 March 1982. For this reason, s. 3(2) of the 1950 Act now reads:

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If any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, a court upon due proof thereof, may order such person to make such monthly allowance, as to the court seems reasonable.

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I also draw support from Maxwell on *The Interpretation of Statutes* (12th edn) by P. St. J. Langan which says at p. 196:

“Now if anything be certain it is this,” said the Earl of Selborne L.C. in *The Vera Cruz*, “that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so.” In a later case, Viscount Haldane said: “We are bound ... to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to.

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It is for these reasons that I consider the plaintiff is not entitled to apply for the maintenance of the two children under the 1961 Act. There is no express provision in the 1961 Act regarding maintenance for illegitimate children. To my mind, the provision of s. 19A(2)(b) of the 1961 Act which learned counsel for the

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- A plaintiff seeks to rely on has no relevance to the matter in issue as it does not apply to illegitimate children. In my judgment, the plaintiff is entitled to apply for the maintenance of the two children under s. 3(2) of the 1950 Act.
- B I respectfully agree with the above judgment. Therefore in respect of prayer 5 the plaintiff was ordered to file her claim for maintenance under the 1950 Act.
- C [14] On the issue of the proper forum to bring a claim for maintenance of illegitimate children, this issue was also dealt with by the court in the case of *Koh Lai Kiow v. Low Nam Hui* (*supra*) wherein the learned Judicial Commissioner said:
- D ... In any event, the expression “court” in s. 3(2) read together with s. 2 of the 1950 Act means a Sessions Court or a Court of a First Class Magistrate. It is clear to me that s. 3(2) of the 1950 Act gives a Sessions Court or a Court of a First Class Magistrate the jurisdiction to order any person who neglects or refuses to maintain an illegitimate child to make such monthly allowance as to the court seems reasonable. As a result, in my
- E view, it is only proper that the appropriate court of first instance should deal with this matter. In this context, the authority that I would like to cite is the case of *Goh Koon Suan v. Heng Gek Kiau* [1992] 2 CLJ 812; [1992] 2 CLJ (Rep) 416). There, the defendant applied under s. 3(2) of the 1950 Act for the maintenance of a child born as a result of cohabitation between
- F the plaintiff and defendant. At the hearing of that application counsel for the plaintiff took a preliminary objection that the High Court as a court of first instance had no jurisdiction to hear the application James Foong JC (as he then was) dismissed the defendant’s application and he said this, and I respectfully agree with him, at p. 813 (p. 417) of the report:
- G The ‘Court’ granting such relief under the said Act has been defined under s. 3 of the said Act, as the subordinate courts. Therefore, such relief as claimed by the defendant, should in the first instance, be brought in the subordinate court. Only when, as
- H provided for under s. 8 of the said Act, such matters in the opinion of the subordinate court are more conveniently dealt with by the High Court, can the matter be referred to the High Court.
- I Learned defence counsel’s reliance on s. 9 of the said Act, to provide the High Court with jurisdiction to hear this application, as a court of first instance, is a misinterpretation of this particular section of the Act.

Though s. 9 does provide the High Court with powers to determine matters arising from the said Act, its powers only relate to matters referred to it by the subordinate courts under s. 8. Section 9 must be read in connection with and, in consequence to s. 8 of the Act and not, on its own to imply that, the High Court can hear such matters in the first instance. Therefore, the court of first instance for relief sought under the Act must be the subordinate court.

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Therefore following the above authorities I ordered the plaintiff to file her claim against the defendant for maintenance for the two children in the subordinate court, which is the court of first instance under the 1960 Act.

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[15] Each party was ordered to bear their own cost.

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